

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 19 2007

COURT OF APPEALS
DIVISION TWO

STELLA F. HIGGINSON and GLENN A.)
HIGGINSON, wife and husband,)

Plaintiffs/Appellants,)

v.)

ALEXANDER BRUCE CHERNETZ, a)
single man; ROBERT B. CHERNETZ)
and NANCY H. CHERNETZ, husband)
and wife,)

Defendants/Appellees.)

2 CA-CV 2006-0157
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20045046 and C20045486 (Consolidated)

Honorable Leslie Miller, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellants Stella and Glenn Higginson appeal from the trial court’s grant of summary judgment in favor of appellees Alexander, Robert, and Nancy Chernetz. The Higginsons argue summary judgment “was improper as there were pending issues of fact.” Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted.¹ *Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). Stella Higginson was a passenger in a car being driven by Theodora Foreman that was struck head-on by a vehicle being driven by Craig Hansen after Hansen crossed the center line of the road. Alexander Chernetz, who had been driving his vehicle behind Foreman’s, then collided with the rear of her car.

¶3 The Higginsons filed an action against Hansen, Alexander, and Alexander’s parents, Robert and Nancy, for injuries to Stella’s leg, ankle, arm, and wrist. Their complaint asserted negligence claims against Hansen and Alexander. It alleged Alexander

¹The statement of facts in the Higginsons’ opening brief does not comply with Rule 13(a)(4), Ariz. R. Civ. App. P., 17B A.R.S., because it does not contain “appropriate references to the record.” We have therefore disregarded their statement of facts, *see Flood Control District of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985), and have instead relied on the Chernetzes’ statement of facts and our review of the record.

had “acted . . . on a family purpose for and on behalf of” his parents, and they had “assume[d] liability, as provided by law, for [his] negligence or wilful misconduct.”

¶4 The Chernetzes filed a motion for summary judgment, arguing the “undisputed evidence establishe[d] that Alexander Chernetz was operating his car in a reasonable manner and that he appropriately reacted to a sudden emergency.” The motion also asserted the parental liability claims the Higginsons had alleged were unsupported by the evidence, and the “Family Purpose Doctrine . . . is an outdated and invalid legal theory.” The trial court granted the motion for summary judgment on the parental liability claims,² denied the motion as to the family purpose doctrine claim, and permitted the parties to submit supplemental materials concerning the negligence claim against Alexander.

¶5 The Chernetzes’ supplement argued, in part, that the Higginsons could not “show that [Alexander’s] actions were a proximate cause of the accident” and stated they had “retained and disclosed” an expert who would “testify that [Stella’s] claimed injuries were caused entirely by the front-end impact.” The trial court granted the Chernetzes’ motion for summary judgment “as to the claims for personal injury” but denied it “as to the claim for property damage.”

¶6 The Chernetzes then filed a motion for clarification, stating the Higginsons had not alleged they had suffered any property damage and “request[ing] clarification that the remaining vicarious liability claim based upon the Family Purpose Doctrine [had] also [been]

²The Higginsons do not appeal this ruling.

dismissed.” The trial court subsequently ordered “that any reference to property damage is vacated from the order [granting the motion for summary judgment].” The court also granted the Chernetzes’ motion to dismiss the family purpose doctrine claim and entered judgment against the Higginsons for costs pursuant to Rule 68, Ariz. R. Civ. P., 16 A.R.S., Pt. 2. The court subsequently granted the Higginsons a default judgment against Hansen. This appeal followed.

Discussion

¶7 A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2; *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). “On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law.” *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should only grant a motion for summary judgment “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶8 The Higginsons contend the trial court erred by “apparently decid[ing], despite the opinions of [their] expert, that 18 year old Alexander Chernetz was not negligent in any respect.” “The basic elements of actionable negligence are a duty owed to the plaintiff, a

breach thereof and an injury proximately caused by the breach.” *Ballesteros v. State*, 161 Ariz. 625, 627, 780 P.2d 458, 460 (App. 1989). Assuming, without deciding, that the Higginsons presented sufficient evidence to create a material factual issue concerning the first two elements, they submitted no evidence suggesting Alexander’s rear-ending Foreman’s vehicle proximately caused Stella’s injuries. “Black-letter tort law tells us that as an essential element of the action, the plaintiff must provide evidence that the defendant’s conduct caused plaintiff’s damage.” *Pinerv. Superior Court*, 192 Ariz. 182, ¶ 11, 962 P.2d 909, 912 (1998).

¶9 In order to demonstrate proximate cause, the plaintiff

must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Restatement (Second) of Torts § 433B cmt. a. (1965); *cf. Wisener v. State*, 123 Ariz. 148, 151, 598 P.2d 511, 514 (1979) (grant of summary judgment improper because “[t]he scales of evidence have been tipped enough for the jury to find by a preponderance of the evidence that the [defendant’s] negligence caused the accident” and, therefore, case was “not a situation in which the probabilities of causation are ‘evenly balanced’”), *quoting* William L. Prosser, *Handbook of the Law of Torts* § 41, at 241 (4th ed. 1971).

¶10 The Higginsons have failed to meet their burden. They do not argue, and the record does not suggest, that the collision with Alexander’s vehicle was more likely the cause of Stella’s injuries than the initial collision with Hansen’s vehicle. Indeed, the Higginsons apparently provided nothing to the trial court describing Stella’s injuries or demonstrating how either collision might have caused them. In the absence of evidence that would permit a reasonable jury to conclude Alexander’s alleged negligent acts caused Stella’s injuries, summary judgment was proper.³ See *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Accordingly, although the trial court did not explain the basis of its ruling, it reached the correct result.⁴ See *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 495 n.3, 733 P.2d 1073, 1078 n.3 (1987) (“We urge trial judges to articulate their reasoning so appellate courts can determine on appeal whether the ruling was erroneous.”); *Guo v. Maricopa County Med. Ctr.*, 196 Ariz. 11, ¶ 16, 992 P.2d 11, 15 (App. 1999) (“We may affirm a summary judgment even if the trial court reached the right result for the wrong reason.”).

³The Higginsons argue the Chernetzes’ expert’s causation opinion was improperly presented to the trial court. We need not decide this issue because the trial court’s ruling was correct irrespective of whether it considered that opinion. Cf. *Cagle v. Home Ins. Co.*, 14 Ariz. App. 360, 368, 483 P.2d 592, 600 (1971) (motion for summary judgment need not be supported by controverting affidavit).

⁴The trial court’s ruling strongly suggests it determined there was no genuine issue of material fact concerning proximate cause. It granted the motion for summary judgment as to the Higginsons’ claim for personal injury but denied the motion “as to the claim for property damage.” The only logical reason for the court to rule this way would be if it had concluded a reasonable jury could infer from the evidence presented that Alexander had negligently struck Stella’s vehicle, but not that the impact had caused Stella’s injuries. See *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶11

Affirmed.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge